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No. 84-1165

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH BENCHIMOL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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Respondent virtually ignores the questions presented in this case: (1) whether, as the court of appeals held, the attorney for the government must explain the government's reasons or justifications for a sentencing recommendation made pursuant to a plea agreement, and (2) whether the omission of such an explanation by the prosecutor furnishes a basis for a collateral attack on the conviction and sentence under Fed. R. Civ. P. 32(d) and 28 U.S.C. 2255, even where, as here, the district court at sentencing clearly understood the substance of the government's recommendation and the defendant made no objection to the government's performance at the time of sentencing or by taking a direct appeal.

1. As we explain in the petition (at 10-17), the new rule announced by the court of appeals finds no support in the Constitution, Fed. R. Crim. P. 11, the logic of the plea

bargaining process, or the decisions of this Court, and that rule may prove detrimental to defendants and deter prosecutors from entering into plea agreements. The decision below also conflicts with decisions of other courts of appeals (see Pet. 17-19) and ignores established limitations on the granting of collateral relief (see Pet. 19-24).

Petitioner makes no substantial effort to dispute these arguments in favor of granting the petition. Indeed, petitioner acknowledges (Pet. 8-9) that in *United States* v. *Grandinetti,* 564 F.2d 723 (5th Cir. 1977), and *United States* v. *Brown,* 500 F.2d 375 (4th Cir. 1974), upon which the court below relied (Pet. App. 4a-6a), the " 'prosecutor expressed open distaste for the plea bargains' " (Pet. 9, quoting Pet. App. 8a (Wallace, J., dissenting)), while in this case the prosecutor did not do so. Respondent argues (Pet. 9), however, that an expression of "open distaste" should be regarded as only one means by which a prosecutor may fall short of his duty to communicate to the court the government's recommendation regarding sentencing, and that this case therefore falls in the same category as *Grandinetti* and *Brown.* This contention is without merit. As we have explained (Pet. 17-19), the First and Second Circuits have explicitly held that the rationale of *Grandinetti* and *Brown* applies only where the prosecutor has "effectively undercut" the plea bargain. Those courts therefore have denied relief where, as here, the prosecutor's recommendation was communicated to the court in a manner that did not undercut the plea bargain, and the defendant's claim was simply that the prosecutor should have been a more forceful advocate in support of the plea agreement. *United States* v. *Tursi,* 576 F.2d 396, 399 (1st Cir. 1978); *Bergman* v. *Lefkowitz,* 569 F.2d 705, 714-716

(2d Cir. 1977). The Ninth Circuit's decision in this case conflicts with these decisions of the First and Second Circuits and thus warrants review.[1]

2. Instead of addressing the questions presented, respondent devotes most of his brief in opposition to a different matter: Congress's enactment of the Comprehensive Crime Control Act of 1984 (1984 Act), Tit. II, Pub. L. No. 98-473, 98 Stat. 1976 *et seq.* See Br. in Opp. 4-8. Respondent first seems to suggest (Br. in Opp. 4, 6) that the decision below is not of continuing importance because the Youth Corrections Act (18 U.S.C. 5001), under which he was sentenced, was repealed by Section 218(g) of the Comprehensive Crime Control Act 1984, 98 Stat. 2027.[2] This suggestion is frivolous. The decision of the court of appeals does not turn on the particular statute under which respondent was sentenced; the opinion does not even mention the Youth

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[1]Other courts also have declined to follow *Grandinetti* and *Brown* in circumstances such as those presented here. See Pet. 19 nn. 11 & 12. In addition, *Grandinetti* and *Brown,* unlike the instant case, arose on direct appeal, not collateral attack. Respondent does not even mention this critical distinction, much less answer our submission (Pet. 19-24) that he has not (i) established "manifest injustice" to warrant relief under former Fed. R. Crim. P. 32(d), or (ii) satisfied the "cause and prejudice" standard to overcome his procedural default in failing to raise the issue at sentencing or on direct appeal and establish a "fundamental defect" in the proceedings warranting relief under 28 U.S.C. 2255. See *United States* v. *Frady,* 456 U.S. 152 (1982); *United States* v. *Timmreck,* 441 U.S. 780, 783-785 (1979).

[2]The Act establishes a new sentencing system, based on sentencing guidelines (see pages 4-5, *infra*), that "is intended to treat all classes of offenses committed by all categories of offenders consistently" and to "eliminate [the need for] specialized sentencing statutes that cover narrow classes of offenders," such as the Youth Corrections Act. S. Rep. 98-225, 98th Cong., 1st Sess. 51 (1983). Congress determined that the provision in 28 U.S.C. 994(d), as added by Section 217(a) of the 1984 Act, 98 Stat. 2020, that the Sentencing Commission's guidelines must take into account the age and criminal history of the offender "is sufficient to assure such specialized treatment as is desirable for th[e] category of [youth] offenders." S. Rep. 98-225, *supra,* at 120.

Corrections Act or the fact that respondent was sentenced under it. Rather, the courts of appeals' holding applies broadly to *any* plea agreement under which the attorney for the government is to recommend a particular sentence, irrespective of the source of the court's sentencing authority.

Also without merit is respondent's alternative contention (Br. in Opp. 5-6) that the Court should deny certiorari because of the provision for the issuance in the future of certain policy statements pertaining to sentencing under the Comprehensive Crime Control Act of 1984. Section 217(a) of the 1984 Act establishes a United States Sentencing Commission, which will promulgate guidelines concerning sentences to be imposed for given categories of offenses committed by given categories of offenders. 28 U.S.C. 994(b)-(d), as added by § 217(a) of the 1984 Act, 98 Stat. 2019-2020. See S. Rep. 98-225, 98th Cong., 1st Sess. 51 (1983). The Act also provides for the Commission to promulgate general policy statements regarding the application of the sentencing guidelines in other contexts, including, inter alia, in connection with a district court's authority under Fed. R. Crim. P. 11(e)(2) to accept or reject a plea agreement entered into pursuant to Fed. R. Crim. P. 11(e)(1). See 28 U.S.C. 994(a)(2)(D), as added by § 217(a) of the 1984 Act, 98 Stat. 2019. This provision was enacted in response to fears that prosecutors might use the plea bargaining process to circumvent the sentencing range provided for in the Commission's guidelines — *e.g.*, by agreeing to reduce the charges in exchange for a guilty plea — and might thereby impede realization of the benefits otherwise to be expected from a system of guidelines that provide similar sentences for similar conduct. Under the new 28 U.S.C. 994(a)(2)(D), the Sentencing Commission is required to issue policy statements to be used by sentencing courts in determining whether to accept a charge-reduction plea agreement in order to assure against undue leniency and sentencing disparity. See S. Rep. 98-225, *supra*, at 63, 167.

It is possible that in some circumstances the contemplated policy statements would result in questioning of defense counsel and the prosecutor by the district court in the case of a plea agreement that provided for the reduction of charges in exchange for a guilty plea, although even then it is unclear to what extent the court would actually require a statement by the prosecutor of the government's justification for a particular recommendation. Nor is it clear that the contemplated policy statements will even address the acceptance of a plea agreement, such as that involved in this case (Pet. App. 2a), that simply provides for the prosecutor to recommend a particular sentence but does *not* provide for a reduction of the charges. In addition, the Act contemplates that the guidelines will provide a range of permissible sentences. 28 U.S.C. 994(b), as added by § 217(a), 98 Stat. 2019-2020. The prosecutor's recommendation, pursuant to a plea agreement, of a particular sentence within that range thus will continue to be of importance, and the court of appeals' holding would apply to such recommendations. It also is possible that the guidelines themselves could provide for a reduced sentence where the defendant has pleaded guilty. The prosecutor's recommendation regarding sentence would be significant in that event as well.

In any event, the 1984 Act does not require that the initial set of sentencing guidelines be issued until April 1986, and those guidelines cannot go into effect for at least six months thereafter. § 235(a)(1), 98 Stat. 2031-2032. Further, there is no fixed deadline for issuance of whatever policy statements the Commission may formulate regarding the application of those guidelines. Respondent's assertion that the court of appeals' decision will be affected by policy statements to be issued at some point in the future by a Commission that has not yet even come into being therefore is wholly speculative.

By contrast, the issue presented in this case are of substantial *immediate* importance, because the decision below opens a whole new avenue of collateral attack on guilty pleas throughout the Ninth Circuit on grounds that have nothing to do with the voluntariness of the guilty plea or the prosecutor's adherence to the essential elements of the plea agreement, but instead relate to the peripheral matter of the quality of the prosecutor's advocacy. Moreover, the court of appeals' holding that the defendant is entitled to have the prosecutor give a statement of the government's justification for a sentencing recommendation made pursuant to a plea bargain would not appear to be limited to federal prosecutions. It therefore calls into question the finality of state convictions based on guilty pleas entered pursuant to such bargains and the duties of state prosecutors in future cases. Plea agreements in state courts of course would not be affected in any way by whatever policy statements may be issued by the Sentencing Commission pursuant to the Comprehensive Crime Control Act of 1984.

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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